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AVIATION

CONFLICT OF TORT LAWS IN INTERNATIONAL AIR ACCIDENTS: EVOLUTION OF *LEX FORI* AND *LEX LOCI DELICTI* IN THE EU & US

Ntorina Antoni[1]*

Abstract

For it is in the nature of men to seek certainty and simplicity in the law. They will wish to regulate a field by a few simple rules if rules of this nature can be devised to handle adequately the problems involved. And if a few simple rules will handle adequately all, or at least the great majority […] men will be tempted to believe that the same rules can satisfactorily be applied to handle all other problems with which they may thereafter be faced.

Willis L.M. Reese in the

"Conflict of Laws and the Restatement Second"

The above words intrigued the interest of the author of this article to make a theoretical analysis of the rules on the conflict of laws as applicable in the field of air accidents with regard to obligations arising from tort. It makes an analysis of the choice of law departing from the ancient rule of *lex loci delicti* in comparison with the most generally accepted rule today *lex fori*. The behaviour of some European countries -prior to and after Rome II Regulation- as well as the United States is assessed towards these rules with regard to their statutes and jurisprudence in a comparative context. The ultimate goal is to exploit the conflict of laws rules and find the commonalities to be able reach the unification of laws among all jurisdictions, the uniformity that along with simplicity will provide legal certainty in tort claims arising in the field of aircraft accidents.

*LL.M (Adv.)Lawyer, Swiss Space Systems Holding SA
[1]The views and opinions expressed in this article are those of the authors and thus may not in any circumstances be regarded as an official position of Swiss Space Systems Holding SA.

Introduction

International air travel has enabled passengers to cross time zones, countries and continents. The growing number of countries involved in air travel is irreversibly proportional to the uniformity achieved among the respective jurisdictions and laws regulating rights and obligations following air accidents. The conflict of laws rules deal with cases that involve more than one State. It includes a set of procedural legal rules that determine the legal system and the particular law of jurisdiction in the case of a dispute. "It concerns the rights of persons within the territory and dominion of one sovereignty by reasons of acts done within the territory of another sovereignty and it is based on the mutual respect of interests"[1]. The nature of aircrash litigation frequently produces an exotic cast of characters, and there is often no ideal place to try the case[2].Conflict of law which is also called choice of law or private international law is extremely important in aviation cases. Aviation by its nature is transitory and therefore an accident rarely occurs in the place of residence of both the plaintiff and the defendant. A single aviation case will almost always involve contacts with several states and sometimes with more than one country, thereby raising choice of law issues.

The methodology of choice of law has undergone radical change in the last decades, particularly in the field of torts. Choice of law is essential for the proper handling of any aviation case for the application of liability standards and rules related to recovery of damages. A decision on the choice of law issue may determine whether the law on strict liability and breach of warranty or the more limited common negligence standard will be applied. Choice of law rules of the forum court can be particularly important in determining the damages that will be recoverable in a given case.

Conflict of laws situations consist of three questions: first, whether the forum court has the jurisdiction to adjudicate on the case at hand; second, if yes then which law applies and if not then which court has the jurisdiction to determine a case with foreign elements; and third, whether the forum court has the power to recognize and enforce a foreign judgment within the jurisdiction of the forum. The legislation of every modern country has rules dealing with these questions, namely conflict of laws rules, contrary to national law. "The rules for determining the conflict of laws are themselves 'laws' in the strict sense of that term, and they derive their authority from the support of the sovereign in whose territory they are enforced"[3].

In aviation cases containing a foreign element, the court will first have to examine if it has jurisdiction over both parties and the cause of action. Having fulfilled this condition, it must then determine the juridical nature of the question presented in the claim. This will entail the breach of contract or the commission of tort[4]. Traditionally, at a national level, the determination of the applicable law in torts falls under the scope of international private law or conflicts of laws rules of a State.

Conflict of Laws and the Warsaw System

The need for uniform private laws in the field of air transport was recognized by the international law community more than eighty years ago in the first International Conference on Private Air Law in Paris[5] where the Comité International Technique d' Experts Juridiques Aériens[6] was created and a draft Convention was prepared. The main goals of the drafters of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) -signed on 12 October 1929 by the representatives of 23 States- were the uniformity of certain rules amongst various jurisdictions in international carriage by air and the limitation of conflict of law with regard to the liability of air carrier towards passengers and their dependents in aviation accidents.

The establishment of homogeneous rules in international flights is intended to overrule the national laws in this domain and leave room for their applicability only domestically. It was necessary to predict and prevent any future situations where the courts would be faced with a myriad of conflict of laws[7]. This objective could not be fully achieved due to the nature of the Convention to regulate "certain" rules and this unavoidably leaves rooms for conflict of laws rules in areas where there was no intention for unification, such as the liability of the aircraft manufacturer. Moreover, the limited applicability of the Warsaw Convention in international carriage by air between contracting parties for reward, means that many flights non-international and gratuitous would be excluded from the purview of the Convention and would be left upon the conflict of laws rules.

Even if the Warsaw Convention were applicable, the interpretation of the provisions would be subject to generally the rules of interpretation of the 1969 Vienna Convention on the Law of Treaties, and specifically the special rule on conflicts of law; the *lex fori* rule or the law of the court seized of the case as stipulated in Article 28(2) of Warsaw Convention. The latter conflict of laws rule has a fragmented nature and governs amongst others contributory negligence (Article 22), period of limitation (Article 29:2), _willful misconduct (Article 25:1) and questions of procedure (Article 28:2), without determining the specific plaintiffs and their respective rights in case of damages sustained (Article 24:2). The cases that are not covered by the Convention either under substantive issues or *lex fori* are to be determined by the conflict of laws. What does the Convention itself provide for the conflict of law rules?

The answer depends on the qualification of the nature of claims as contractual or tortious, with the latter not easily determined. This distinction has essential legal consequences for the plaintiff with regard to questions of the establishment of a cause of action, the indication of the recoverable damages and who is entitled to claim damages especially in air crashes[8]. Article 24(1) refers to "any action for damages" without specifying which heads of damages are compensable. The provisions under articles 24(2) and 17 do not solve these issues but are open to interpretation under the national laws. The answer to the former question becomes even more significant for situations out of the scope of the Warsaw Convention which are left upon the characterization of the act and the choice of law rule by the national courts[9]. The "hodgepodge supplementary amendments and inter-carrier agreements" along with the various judicial interpretations that were given to the Warsaw Convention in different jurisdictions did not contribute essentially to the uniformity but they rather "disunified", as Professor Haanappel mentions, the so-called

Warsaw Convention "system"[10].

Despite the amendments, the shortcomings of the Warsaw Convention *inter alia* in the tight liability caps for death and injury, led to its replacement seventy years later by the 1999 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention). The latter provided exclusive causes of action and remedies against an air carrier for injury and death during international air carriage as it was affirmed in *Carey v. United Airlines 2001* case. The Montreal Convention removed the cap on damages for the plaintiffs, by making the air carriers easily defendants. The five fora introduced by the Convention in Article 33(1) do not resolve the issue of conflict of laws as to the persons who have the right to sue and their respective rights in tort claims. The situation does not change a lot compared to the Warsaw system, where the *lex fori* rule is also adopted and recognized in Article 33(4) of the Montreal Convention but has not achieved a uniformity of applicable laws in this respect.

To conclude with the Conventions setting the conflict of laws rules and shifting towards a more general context, it is quite remarkable that what has not been achieved yet at the level of international law in terms of contractual private relationships we notice at the European Union level. A number of regulations effectively harmonize the conflict of laws rules of the EU Member States; the binding effect of EU regulations on all EU Member States as based on Article 81 of the Treaty on the European Union and expressed through the 2008 Rome I Regulation aims for the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction, as specified in its Preamble. It is clear that it is not applicable to torts claims and thus it does not resolve issues following international air accidents lacking a contractual nexus.

Lex fori and Lex loci delicti

The interests affected by tort in air accident cases shall be protected under the conflict of law rules that cover any unlawful conduct generating liability[11].

The long-standing dominance of *lex fori* and *lex loci delicti* theories in the field of tortious actions was replaced later on by the theory of *the proper law of the tort* as developed under Anglo-American law. The application of the *lex fori* is suggested due to the compulsory nature or else the public policy considerations attributed to the rules of tort law. The reasonable argument against this approach is that liability cannot be established for any action under the law of the place where it was committed, while at the same time the risk of forum shopping is highly probable due to the absence of exclusive international jurisdiction in tort liability[12].
The theoretical foundation for the application of *lex loci delicti* in tortious obligations is not that straightforward as *lex fori*. The prevalence in jurisprudence has been based on arguments of practical nature such as the proximity offered by the law of the place of wrongful act -the existence of a natural link-, the certainty of the *a priori* knowledge on the laws that each person shall comply with, and of course, the fact that each State has the power to regulate the legal consequences of any act committed within its territory[13].

Ultimately in the choice of law, the prevailing principle was *lex loci delicti* for the essential implications on the indication of the place where the act was committed against the place where the impact or damage occurred. At the same time, there was the introduction of the joint doctrine which promotes the freedom of choice of the plaintiff between the place where the act was committed and the place where the impact of the wrong took place[14].

The traditional and still dominant rule in resolving conflict of laws has been in the past *lex loci delicti*[15] which governs the substantive rights of the parties to a tort action[16]. It was "unanimously established by the canonists and later the statutists since the 13th century and has been generally adopted today"[17].This rule stipulates that the law of the place where an alleged tortious act has been committed determines whether this constitutes a cause of action, and if so, it specifies the conditions, the degree, and the implications thereof.

This doctrine has been widely accepted by many States due to the ease of application, its predictability of outcome and its symmetry of application to the parties providing legal certainty; conditions that should be fulfilled by all the choice of law rules[18]. *Lex loci delicti* is regarded as "the necessary consequence of the delinquent's wrong committed in the particular spot[19]", a sensible and logical rule that complies with the principle of territorial jurisdiction. Therefore, the law of that place shall be inviolable. Moreover, legal certainty is achieved due to the predictability and foreseeability, for it can be used as a tool to indicate the applicable law at the place where the act occurs[20]. The above aspects are of particular importance in air accidents with a large number of victims sustaining damages.

Although the *lex loci delicti* rule's large application in aviation cases is profound - *Choy v. PanAm Airways 1941*, *Supine v. Air France 1951*, *Pignarato v. United States 1961*- it has been criticized for certain drawbacks in the choice of the applicable law due to its defective or inadequate nature. The place of injury can be hardly determined in big aviation disasters, and even if so, it can be completely fortuitous as the aircraft might cross several countries and crash in a country that has no connection at all with the intentions of the claimant. Regarding the "vested rights" theory as applied in the US, it does not take into consideration the other policies concerned that might be affected by the outcome as confirmed in *Babcock v. Jackson 1963*. The ambiguous results the rule might have in damages claims are also reflected in the fact that "several important courts have expressed dissatisfaction with the rule or else have reached results that are inconsistent with it"[21]. To the direction of overcoming these disadvantages, the courts have occasionally managed to circumvent the application of the rule, for instance by characterizing the nature of the claim procedural instead of substantive or by recourse to *renvoi*[22].

Conflict of laws in Europe

The application of the *lex loci delicti* rule in Europe has played a very important role in the past, although most of the statutes and case law were not related directly to air crash cases[23]. Notwithstanding the fact that the 2007 Rome II Regulation governs now the non-contractual obligations in Europe, it is still interesting to see the

impact of these laws in the development of the current European legislation. The cases of Greece, Germany, France and England as applicable prior to and after the harmonization of conflict of law rules in the EU will be assessed.

Prior to Rome II Regulation

Greece

In Greece tort liability was regulated by the law of the State where the tort was committed pursuant to Article 26, Greek Civil Law Code 1946. _The Greek legislator fully adopted the principle of *lex loci delicti*, by abandoning the *lex fori* which was applicable according to the previous law in Article 6(2), Greek Civil Law Code 1856. Regarding the determination of the place where wrong was committed; the law puts much more weight in the act of the tortfeasor rather than the impact or occurrence of damage. Pursuant to Greek jurisprudence, when the conduct and impact of the tortious action take place in the territories of different States, the choice of the applicable law is on the claimant. In the Supreme Court case 295/2000 the court followed the joint doctrine, influenced by the international trends that consider *lex loci delicti* outdated as to the needs of modern times and for this reason alternatives are suggested to avoid its application such as escape clauses.
This could have interesting effects in aviation accidents that these two places do not coincide. The choice of *lex loci delicti* in the conflict of laws under the Greek national law is very consistent with the majority of laws in European countries, where a relative uniformity is observed -with some rare exceptions- as regards the place where the tort was committed.

Germany

In German law -Articles 38-42 provide for the Introductory Law in the Civil Code/ Einfurhungsgesetz zum Burgerlichen Gesetzbuch (EGBGB 1896, reformed in 1994) - the tort claims are based on the place of the tort, according to the *lex loci delicti* principle which has not changed with the reform in 1986. When the place where the tortious act was committed is different from the place where the resulting impact occurred, the German conflict rule leads to the application of the legal system which is closely connected to or more favourable to the plaintiff (Günstigkeitprinzip) [24]. This application is restricted by virtue of Article 38 EGBGB, which does not allow the enforcement of larger claims than those provided under German law for a wrongful act committed abroad[25].
Another exception provided thereunder is highlighted in the Bundesgerichtshof decision (Entscheidungen des Reichsgerichts in Zivilsachen 2011), where German law applied to a German passenger against German's tortfeasor estate for claims arising from an air crash of a private plane in France. Article 38 also gives the flexibility to the plaintiff to ask for the application of the law where the impact of the damage has occurred if that is the permanent place of residence during the conduct of the tortious action[26]. Other considerations for the conflict of law rules are those of public policy as highlighted under Article 6 EGBGB.

France

In France, there is no codification of private international law rules, while the degree of regulation varies respectively according to each specific topic. In the conflict of law in torts the application of *lex loci delicti* has been imposed by the great persistence of jurisprudence in this principle, albeit there are some fluctuations mainly in favour of the *lex fori*[27]. *Lex loci delicti* was enunciated in the *Lautour c. Veuve Guiraut 1948* and in *Kieger c. Amigues 1967* cases. The choice between the *lex fori* and *lex loci delicti* is considered interesting from the French perspective only in terms of theoretical exercise, since generally a rapprochement in these two principles is noted. In addition to this, insurance companies generally seek to settle disputes with a n international dimension out of court or via arbitration. Consequently, there are very few decisions on the choice of applicable law in the conflicts of law question, despite the large number of suits based on tort liability. Nevertheless, the principle of the *proper law of the tort* has become popular in French law. In terms of air carrier liability of in France, the decision of the court would be based on the obligation of result. In this case, strict liability would be attributed as liability would be based on contractual obligation derived from the respective conflict of laws rule.

England

In England, the traditional rule in torts committed abroad was enunciated in the well-known *Phillips v. Eyre 1870* case, where it was stated by Willis J that: "*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done*". This means that a tort action may only be brought before English courts if the wrong committed abroad is actionable under both the English law (*lex fori*) and, also, the law of the nation where the wrong occurred (*lex loci delicti*). Later on, in the *Machado v. Fontes 1897* case concerning a libel in a publication the interpretation of the rule changed. It was held by the Court that it was sufficient that the act was wrongful in both England and Brazil, where the act was committed, without requiring the act to be actionable in the place of wrong. Lopes LJ made a reference to the second branch of the *Phillips v. Eyre* case and highlighted that it sufficed the act was not justifiable by the law of the place where it was committed, and the only defence available would be the act to be regarded completely innocent by the latter[28].

The latter was overruled in the *Boys v Chaplin 1971* landmark decision in the development of English choice-of-law rules in torts. It restored the double actionability test by holding that the damage or head of damage had indeed to be actionable under the *lex loci delicti* as well as under English law in *Hardling v. Wealands 2006*. Its significance is illustrated in the doubt, uncertainty and confusion of the outcome deriving from the wide range of the nine opinions of the Lordships. This confusion was mainly due to the different approaches as to the requirement of actionability by English law and justifiability by *lex loci delicti* which made it difficult to determine the *ratio decidendi* of the case[29]. For instance, Lords Hodson

Wilberforce the *lex loci delicti* rule for liability in personal injury on the basis of the most significant relationship with the place of occurrence and the government interests approach respectively, as had been reflected in the American approach that we will see in the following section. A different opinion was expressed by Lords Guest and Donovan that preferred the application of *lex fori* as the non-economic damages were regarded as remedies and a matter of procedure. In the Private International Law Act 1995 (UK) the double actionability rule was abolished and replaced by the *lex loci delicti*, together with some flexible exceptions[30]. A peculiarity, noted by Bogdan in the English law was the application of Article 3 of the Carriage by Air Act which applies substantive rules under English law to all air carriage cases outside Warsaw Convention, regardless of the connection of the parties with England. This was followed in the *Holmes v. Bangladesh Biman Corp. 1987* case of fatal accident where the maximum amount of the carrier's liability was attributed on a purely domestic flight in Bangladesh.

After Rome II Regulation

Since 2009, the situation regarding the conflicts of law rules changed in the EU and the above national regulations are no longer valid. Rome II Regulation -bound by all the Member States- defines the conflict-of-law rules applicable to non-contractual obligations in civil and commercial matters, including product liability, *negotiorum gestio* (agency without due authority) and *culpa in contrahendo* (faulty in contract negotiation)[31]. It does not attempt to harmonize the substantive law of States in terms of non-contractual obligations, but only their conflict-of-law rules, so that, no matter where in the EU an action is brought, the rules determining the applicable law will be common. The applicable law according to Article 4 of Rome II is presented in the following order: a) the law of the country where the direct damage occurred (*lex loci damni*); b) the law of the country where both parties have their habitual residence when the damage occurred (*lex communis domicilii)*; c) the law of the country with which the tort/delict is manifestly more closely connected than the other countries. Article 14(1) of Rome II further allows the parties the capability to choose the applicable law, under which the tort will be regulated, either prior to or even after the cause of damage because of tort.
The evolution of the choice of law as regards tort in Europe, starting from the rules *lex fori* and *lex loci delicti* to the rules of *lex communis domicilii* and *lex loci damni*, appears to have obtained large dimensions. Interestingly enough the indicated substantive law that derives from the conflict of law rules does not seem to solve all the questions that arise. Although questions such as damage, causal link and the extent of compensation are governed by Rome II, the preliminary issue of whether a fact or a legal relationship is indicated during the application of *lex causae* remains unresolved. This means that we need to find another conflict of rule law that will determine the applicable law to solve the preliminary question and this could bring us back to where we started; *lex fori*? It remains to be answered, especially in the area of air accidents whose special nature might constitute a further impediment to the answer.

Conflict of Laws in the US

The long jurisprudence in the US, with a considerable number of cases in aircraft accidents, has gradually led to the choice of law revolution mainly in tort law. Traditionally, the approach within the United States in conflicts of law regarding tort was the application of the *lex loci delicti* rule, the law of the place of the tort,

while today only a few States continue to apply it.

The theoretical basis for this approach was the "vested rights" theory -introduced by the Dutch jurist Huber which is rooted in the principle of territoriality. It is argued that the exclusive sovereignty and jurisdiction of every State within its territory means that "the rights created by law within the geographical limits are vested to a person until destroyed by operation of such law"[32]. Beale has supported that the common-law rule is to apply the law of the place where the "act claimed to be a tort was committed". This was confirmed in the *Manos v. Trans World Airlines, Inc. 1969* case concerning an air crash with twelve casualties and injuries. It was decided that Italian law was applicable to determine liability according to the *lex loci delicti*. The interpretation given to the conflict of laws was "relaxation of the *lex loci delicti rule*" as the conflict was considered "false", justified on the similarities between the laws involved. The first case that opened the door and started revolution from the wooden rule *lex loci delicti was* the *Kilberg v. Northeast Airlines Inc. 1961* a case of a fatal plane crash in Massachusetts where the exception of applicability was based on public policy reasons and influenced by the fortuity of the place of accident.

Gradually, the courts started to avoid the application of this rule by qualifying the claim as non-tortious or by other means. Ultimately, the rule was abandoned for a more flexible theory of "the most significant relationship" in the *Babcock* case of negligence, according to which tort issues are governed by the substantive law of the State which has the most significant contact with the plaintiff. This would mean to bring "justice, fairness and the best practical result" and in this respect it was applied in many aviation cases and wrongful death actions arising from aviation disasters. The rule of the most significant relationship was embodied in paragraph 6 of the Second Restatement on Conflicts of Law in 1971. The test required the "evaluation of the relative interests of the different jurisdictions and the identification of contacts that have the primary importance in a choice of law contest".

The evolution in the conflict of laws rule led later on to the use of a new concept "depecage", meaning the choice of law for each single issue, namely issue-by-issue determination. This principle has been supported by Reese recently and adopted in the codification of rules on tort law in the "Act on Choice of Law for Torts and Other Non-Contractual Obligations" by the State of Oregon. On the pursuit of additional flexible approaches, the courts did not hesitate to differentiate in each case and apply choice of applicable law based on various criteria such as the governmental interest, which has been introduced by Brainerd Currie. These criteria were against the strict conflict of law rules, but for the choice of rule that will consider all the potential implications of the particular choice with relation to the substantive laws and the underlying policies in each State. The comparative impairment analysis in terms of balancing the interests of the parties involved was applied to the *In re Paris Air Crash of March 1974* an "Aegaonic" case with conflict of laws issues. It was held that *lex fori* was the most appropriate rule based on the interest test in all aspects of damage claims.

Additional revolutionary theories have been developed by distinguished academics that attempted to find the best alternative approach to the solution to the choice of law problem. Apart from Currie, also Leflar suggested the choice of influencing considerations on policy grounds as more impersonal and less subjective. Both theories were opposed with the fear that they would end up applying *lex fori* in most of the cases.

Conclusions

Private international air law is an area that still needs to be developed for a better-unified system under the umbrella of an international agreement. Although Warsaw and Montreal Conventions provide for some rules, they have not yet achieved complete unification of the national applicable laws, with the result that claims following international air accidents are exposed to a random and maybe unfavourable regime of divergent conflict of laws rule. This is not the case for Europe where Rome I Regulation regulates conflict of laws rules for contractual obligations and Rome II provides for the regulation of conflict arising in a non-contractual context.

The conflict of law rules that cover any unlawful conduct generating liability and arising from tort in air accident cases have been developed under various theories and range from the rule of *lex fori* and *lex loci delicti*. While both rules have been widely considered in the past for their application to aviation cases for certain advantages they entail, they have been criticized for either generating the risk of forum shopping or for the fortuitous location of the crash in most air accidents. Despite its drawbacks, the *lex loci delicti* rule had been predominantly adopted in the national laws and jurisprudence of Greece, Germany and France in tort actions, with the exception of England where both *lex fori* and *lex loci delicti* were taken into equal consideration. This situation significantly changed after the adoption of Rome II Regulation in Europe, which introduces the *lex loci damni* and *lex communis domicilii* for the applicable law in non-contractual obligations. A more flexible approach is reflected on the third rule introduced which stipulates as proper law -although last in order of priority - the law of the country which is more closely connected to the tort than the other countries. We can imagine that this is not easy to determine in aviation accidents due to the complexity thereof. There are definitely issues that cannot be solved and consequently they might bring us back to the beginning; the application of *lex fori*.

However, what became clear through the analysis on the conflict of laws rules of the different approaches followed worldwide for similar tort claims in air accidents is the following conclusion. All the theories and practices developed, especially in the US and also recently in Europe through Rome II, have been shifting from the rigid nature of the *lex loci delicti* or *lex fori* and have started taking into consideration all the factors required for a just decision. The most significant contacts test, governmental interest and the choice of influencing considerations demonstrate the need for a simple and fair rule that will assess the consequences of the applications of each law and will suggest the “better” one. This could be the most appropriate approach to unify national applicable laws regarding tortious claims that arise from international air accidents.

[1]*N. H. Kinzy, "Current aviation decisions in conflict of laws" (1975) Journal of Air Law and Commerce, 41, at 311.*

[2]*Simpson, "Recent Trends in International Aviation Accident Litigation-A Practical View" (1980) Annals of Air & Space Law, 5, at 189; Maunder v. DeHavilland Aircraft of Canada Ltd, 112 III App.3d 879 (1983).*

[3]*Dicey, Morris and Collins, The Conflict of Laws (2012) Sweet and Maxwell, at 4.*

[4]*Cheshire, North and Fawcett, Private International Law (2008) Oxford University Press, at.3.*

[5]*R.I.C. Bartsch, International Aviation Law: A Practical Guide (2013) Ashgate Publishing: at Introduction; The Conference took place from 26 October till 4 November 1925.*

[6]*I.H.Ph. Diedrieks-Verschoor, P. Mendes de Leon, An Introduction to Air Law (2012) Kluwer Law international, at 9.*

[7]*A.F. Lowenfeld, A.I. Mendelsohn, "The United States and the Warsaw Convention" (1967) Harvard Law Review, 497, at 510.*

[8]*R.H. Mankiewicz, "From Warsaw to Montreal with Certain Intermediate Stops; Marginal Notes on the Warsaw System (1989) Air and Space Law, 14:6, at 165.*

[9]*F. de Visscher, "Les conflits de lois en matière de droit aérien" (1934) Collected Courses, Hague Academy of International Law, 48:285 at.334.*

[10]*P.P.C. Haanappel, The Law and Policy of Air Space and Outer Space (2003) Kluwer International Law, at 68.*

[11]*L. M. Bentivoglio, Conflicts Problems in Air Law (1963) Collected Courses, Hague Academy of International Law, 83:119 at 151.*

[12]*Beitzke, Les Obligations Délictuelles en Droit International Privé (1965) Hague Academy of International Law, II, at 73-75.*

[13]*A. Tenekidou-Fragkopoulou, Tort According to Private International Law (1956) Athens, Maridaki Private International Law I2, at 18-21, (in Greek, Translation in English by the author).*

[14]*S. Vrelli, Private International Law (2008) Nomiki Vivliothiki, Athens at 249-250.*

[15]*Bartolus, Com. ad Cod. Lib. 1, tit. 1, lib. 1, n. 20, 21; n. 44, n. 47, tom. 4, at 4 (Edit. 1602): This rule's origin is deeply rooted in European continental history. In the Middle Ages, the prominent jurist Bartolus stated that '[d]elicta puniuntur juxta mores loci commissi delicti, et non loci ubi de crimine cognoscitur'. The translation could state as follows: '[d]elicts must be punished according to the laws of the place where the delict occurred, and not of the place where the crime is ascertained'; Ad legem cunctos populos C. 1.1.1 n. 11/ also known as Edict of Thessalonica.*

[16]*K. H. Norman, "Current aviation decision in conflict of laws" (1975) Journal of air law and commerce, 41, at 312.*

[17]*E. Rabel, The Conflict of Laws: A Comparative Study (1947) Ann Arbor, MI: University of Michigan Law School, II: at 235- 236.*

[18]*W.M. Reese, "Conflict of Laws and the Restatement Second"(1963) Law and Contemporary Problems, 28:679, at 686.*

[19]*F. Wharton, A Treatise on the Conflict of Laws, or Private International Law, (1881) Kay and Brother Edition.*

[20]*A. Nicita, M. Winkler, "The Cost of Transnational Accidents: Lessons from Bhopal and Amoco" (2009) Journal of World Trade, 43:4, at 686.*

[21]*Supra note 18, Reese, at 699.*

[22]*Ibid, at 694.*

[23]*M. Bogdan, "Conflict of laws in air crashes: remarks from a European's perspective" (1988-1989) Journal of Air Law and Commerce, 54:303, at 327.*

[24]*Reichsgericht on 12 November 1932, Entscheidungen des Reichsgerichts in Zivilsachen, vol. 138, p.243; Aircraft accidents, bogdan, at 93.*

[25]*Translation given by B. Dickson, in "The reform of private international law in the Federal Republic of Germany" (1985) The International and Comparative Law Quarterly, 34:2, at 236, footnote 27.*

[26]*M. Bogdan, Aircraft Accidents in the Conflicts of Laws (1988) Hague Academy of International Law, at 93.*

[27]*N. Loussouarn, Bourel, de Vareilles, Sommieres, Droit international privé (2004) Dalloz, Paris, at 225.*

[28]*T.C. Hartley, International Commercial Litigation: Text, Cases and Materials on Private International Law (2009) Cambridge University Press, at 534.*

[29]*M.V. Clarckson, J. Hill, The Conflict of Laws (2011) Oxford University Press, at 292-293.*

[30]*P. Terblanche, "Lex fori or lex loci delicti: The problem of choice of law in international delicts" (1997) The Comparative and International Law Journal of Southern Africa, 30:3 at 246.*

[31]*M. Zhang, "Party Autonomy in Non-Contractual Obligations: Rome II and its impacts on choice of law" (2009) Seton Hall Review, 39:863.*

[32]*J.B. Wolens, "A thaw in the reign of lex loci delicti"(1966) Journal of Air Law and Commerce, 32:408 at 412; J.H. Beale, A Treatise on the Conflict of Laws (1935) New York: Baker, Voorhis & Co. ,II at 1289: " [t]he existence and nature of a cause of action for a tort is governed by the law of the place where the plaintiff's alleged right to be free from the act of event complained of is alleged to have been violated by a wrongful act or omission. It follows therefore that the law of the place of wrong determines whether or not there is a cause of action for the wrong".*

AVIATION

PSYCHOPATOLOGY: AN UNDERESTIMATED HAZARD FOR AVIATION SAFETY?

Paola Tomasello*

On 24 March 2015, flight GWI18G operated by Germanwings with an airbus A320, carrying 150 people on board crashed in the foothills of the French Alps. The plane, carrying young people, vacationers and others, was flying from Barcelona to Düsseldorf. It crashed after an eight-minute descent from 38,000 feet. Everyone on-board sadly died.

According to Regulation (EU) 996/2010 [4], the French Aviation Investigation Body (BEA) has initiated a formal safety investigation. The initial readout of the Cockpit Voice Recorder showed that the co-pilot Andreas Lubitz locked himself into the cockpit alone taking advantage of the temporary absence of the Pilot-in-Command (PiC), Patrick Sonderheimer, due to physiological needs. From that moment on, Lubitz stopped speaking and no longer allowed the PiC enter the cockpit. The co-pilot deliberately set the autopilot to automatically descend to an altitude of 100 feet (about 30 metres) and thereafter, on several occasions during the descent, the co-pilot modified the autopilot setting to increase the speed of the airplane along the track, as confirmed by initial findings obtained from the Flight Data Recorder. Lubitz was still alive until impact with the ground, so any temporary incapacitation due to physical causes is excluded.

Investigators are continuing their work to establish the precise history of the flight, but the preliminary findings already confirm that Lubitz's actions on the flight controls can only have been deliberate. So, Lubitz committed suicide. Based on this, it has been surmised that Lubitz suffered from depression. Such a possibility has been reinforced by the fact that anti-depression medication was found in Lubitz's home. Furthermore, there was evidence that Lubitz had undergone psychiatric treatment in specialised centres in the past.

Hence, the event appears to be a case of murder-suicide, which is very different from a simple suicide from the psychopathological perspective and extremely rare, especially outside domestic contexts.

In fact, in these sad situations, one person wishing to end her/his life takes the lives of others - in this case, complete strangers - at the same time. The elements that are confirmed so far, for example the fact that Lubitz locked himself into the cabin, suggest a premeditated action. This would seem to indicate a narcissistic or paranoid attitude rather than depression. In fact, the co-pilot behaved under a precise and long-matured thought, then acted driven by impulse, erasing from his mind all other concerns, including his responsibility for the lives of other crewmembers and passengers.

In this light, the Germanwings accident could be seen as a result of an intentional violation of rules and procedures conceived to cause damage, where the planned ac-

*Aviation Psychologist

tion (violation) achieves the outcome (damage) desired by the author. Hence, this type of behaviour does not constitute human error [3] and, following investigation, could be considered an act of sabotage (maybe associated to psychopathological issues).

In recent aviation history, there are at least four cases where the suicidal intention of one of the two pilots has lead to the crash of an airliner and the death of everyone on -board. The oldest case dates back to 21 August 1994, when an ATR42 of Royal Air Maroc crashed on the ground in the vicinity of Agadir and 44 people died. Moroccan authorities ascertained, based on CVR listening, that the accident was due to the suicidal intention of the 35 year-old pilot. In fact, the audio of the last 30 minutes of the flight revealed that he screamed he wanted to die.

On 19 December 1997, in Indonesia, a Boeing 737-300 operated by Silk-Air crashed on the Sumatra Island and 104 people died. The Indonesian investigation authority concluded that the accident was deliberately caused by the PiC, who wanted to commit suicide. Also in this case, the CVR provided sufficient evidence, revealing also the struggle by the co-pilot in trying to take control of the aircraft.

Again, on 31 October 1999, a Boeing 747 operated by EgyptAir crashed into the sea near the American coast of New England. All 217 people on-board died. The USA National Transport Safety Board (NTSB), competent as State of Occurrence per ICAO Annex 13, established that no technical failure was among the causal factors of the accident, which instead originated from a deliberate action by the pilot.

More recently, on 29 October 2013, flight TM470 with 27 passengers and 6 crew members on-board crashed while flying over Botswana. The investigation, even in this case, revealed that the pilot had deliberately led the plane to crash.

There are several other recorded events, albeit of lesser severity. Cases of air disasters due to pilots' or passengers' suicide are collected in the database of the Aviation safety network http://aviation-safety.net/database/dblist.php?Event=SES.

Now, the question is how safety against the hazard related to psychopathological issues can be ensured. In other words, how fit for duty of crew is assessed also from this perspective and whether current rules are sufficient.

Often in aviation, safety hazards are addressed through hardware and software solutions (i.e. technology) or through procedures. Through hardware (sensors of weight on pilot positions, modifications to doors) or procedures (crew always composed of two pilots), hazards can indeed be mitigated; but no hardware solution can mitigate the risk of a scuffle in the cockpit, which was part of at least two of the aforementioned accidents. On 27 March 2015, EASA published a temporary recommendation for airlines to ensure that at least two crew members, including at least one qualified pilot, should be in the flight crew compartment at all times during the flight. Airlines need to re-assess the safety and security risks associated with a flight crew member leaving the cockpit due to operational or physiological needs. Fine: all this enhances safety.

But, is this enough to ensure fitness for duty? One should perhaps read the current EASA part-MED [1] where it addresses the requirements for class 1 pilot's medical certificates. In particular, AMC1 MED.B.055 "Psychiatry" includes psychotic disorders, organic mental disorders, use or abuse of psychotropic substances, schizophrenia and mood disorders as totally or partially disqualifying. Regarding personality or behavioural disorders, the regulation states "where there is suspicion or established evidence that an applicant has a personality or behavioural disorder, the applicant should be referred for psychiatric opinion and advice". But no guideline is given on how and when assessment has to be performed. AMC1 MED.B.060 "Psychology" is also included in the medical conditions to assess the fitness for duty of cabin crew, and states that pilots should undergo psychological assessment only when specific indicators are detected in their anamnesis. However, even when psychological assessment is deemed necessary, currently no rule exists which establishes repeating it on a periodic basis. Thus, these tests are not repeated according to a standard consolidated praxis, but are only used ad hoc on a case-by-case basis, when a particular need is detected.

But ensuring on-going fitness for duty – physically, cognitively and emotionally – is one of the most crucial aspects in aviation safety, while emotional issues also can play a debilitating role on the flight line, in the dispatcher's office or on board the aircraft. Quay Snyder, MD, president and CEO of the Aviation Medicine Advisory Service stated: "Up to 25 per cent of the population suffers emotional disorders during their lifetime. People can certainly be successfully treated". He added: "But the challenge is that people in aviation, pilots in particular, who tend to be a stoic group, refuse to acknowledge such a problem or seek help. We have to educate them to conquer their reluctance and get help when needed" [5]. Even ICAO is slowly recognising the relevance of emotional fitness, at least in its recent RPAS Manual [2], which describes the notion of "competence" as not only "to know" (theoretical knowledge) and "to know how" (practical skill) but also "to behave" (= psychological aspects).

Indeed the problem has been widely investigated in the nuclear sector, resulting in detailed consolidated programmes to assess fitness for duty, also from a psychological point of view, of nuclear facility personnel [6] based on the standards provided by the American Psychology Association.

The author hopes that this direction will be followed up by the definition of standard psychological assessment and monitoring programmes also in the aviation field, to be specified both at regulation and at praxis level.

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SPACE

OPERATIONAL APPROVAL OF PERFORMANCE BASED NAVIGATION (PBN)

Maria Grazia Cristofaro*

Performance Based Navigation (PBN) is the new ICAO concept that exploits Global Navigation Satellite Systems (GNSS) and computerized on-board systems to navigate aircraft all over the world, as most of us already do with GPS in their cars. PBN is a radically new idea for regulating navigation avionics on board aircraft. In fact in the past aviation authorities mandated to carry on-board specific navigation sensors, so constraining freedom of designers. The PBN concept, largely based on satellite positioning, instead only prescribes the "performance" (accuracy and other parameters) which the on-board systems have to achieve, leaving designers free to define any possible architecture for their avionics. The core is however a computer which guides the aircraft from origin to destination through a series of way points and one or more GNSS receivers which provide the present position of the aircraft in latitude, longitude and altitude. Any point on the Earth can be a way point entered into the computer, and this enables to develop and implement more flexible and safer instrument routes including landing procedures, which also may optimise flight time and reduce environmental impact and fuel consumption.

PBN, detailed in ICAO Doc 9613 "Performance Based Navigation Manual", encompasses RNAV and RNP operations[1]. However to fly PBN operations and take advantage of their benefits (e.g. land safely at regional airports not equipped with costly radio navigation aids on the ground or fly helicopters to hospitals in low visibility), not only the aircraft needs to be properly equipped, but also the pilots have to be trained and the operator considered able to organise such operations.
Doc 9613, even in its latest fourth edition published in 2012, recommends[2] that aviation authorities should issue a specific "operational approval" to operators before they can fly any PBN type. For small commercial operators (e.g. commercial helicopter operations) and for general aviation, the obligation to apply several times, and each time to provide a consistent dossier of documents, is a significant administrative burden. This infamous "operational approval" idea has historical origins. In fact RNAV was developed in 1960s in the United States to give aviators more flexibility in deciding their horizontal path (i.e. no longer obliged to overfly ground beacons). The first 16 RNAV routes were published in 1969 for domestic use in the USA.

Later (1977) the Minimum Navigation Performance Specification (MNPS) was the first example of coupling RNAV with performance requirements (mainly positioning accuracy).
The U.S. FAA, aware that this new type of operations presented safety challenges, hence published the Advisory Circular (AC) 91-49 clarifying that operators wishing to use MNPS, had to "show compliance" with applicable specifications to obtain a specific operational approval, at the end of an administrative process.

*Researcher at Parthenope University of Naples (Napoli)

In Europe, along the lines of the United States, the request for a specific approval to MNPS and later to RNAV and several other operations has been consistently applied until today[3]. So now, also PBN operations, in Europe, are subject to a Specific Approval (SPA).
EASA, conscious that the list of operations requiring this additional administrative process had grown along the years, leading to excessive administrative burden on operators, in particular if small or private, in 2012, under initiative of Prof. Filippo Tomasello, launched two Rulemaking Tasks (RMT.0256 and RMT.0257) to possibly reduce the administrative burden to fly PBN. EASA hence published Notice of Proposed Amendment (NPA) 2013-25 "Revision of Operational Approval Criteria for Performance Based Navigation (PBN)", with main focus on operations of fixed-wing aircraft. This NPA proposed to eliminate the infamous "operational approval" administrative process for almost all PBN types, while maintaining safety through modernised pilot training for instrument rating (IR). The NPA received 200 comments, all of them in principle supporting the proposal!
Therefore, on 31st March 2015 EASA published Opinion 03/2015[4] addressed to European Commission to modernise pilot training[5] and consequently eliminate the operational approval to fly most PBN specifications. This modern attitude taken by EASA has already influenced ICAO, whose Panel on flight operations has already proposed changes to Annex 6 going in the same direction as EASA and so removing the requirement for operational approval for the majority of PBN specifications. These amendments to the ICAO standards are expected to become applicable in November 2016, in the same time frame of promulgation of the new EU rules.

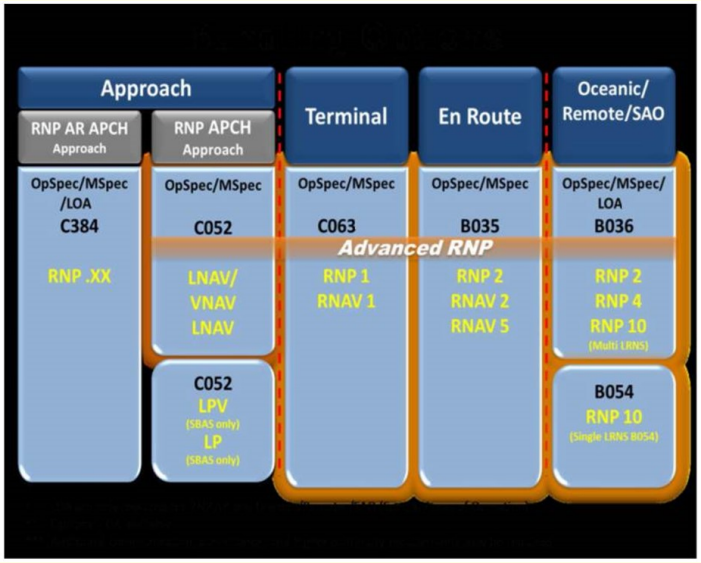
In contrast to the line taken by ICAO and EASA, which is already followed by Australia and Canada, the Federal Aviation Administration (FAA) in the USA has taken a slower approach. In fact, in 2014, FAA published a proposed Advisory Circular (AC) 90-105A in which the request for operational approval is maintained although a "bundling" concept is introduced. "Bundling" allows operators holders of certain specific approvals for PBN to fly other PBN navigation specifications without the need to request additional authorizations.

The 4th edition of Doc 9613 includes the following relevant helicopter/aircraft navigation specifications:

- RNAV 10 (i.e. navigation error not greater than 10 nautical miles, alias 18 km) for oceanic and remote continental airspace;
- RNAV 5 (5 nautical miles, equal to 9 km) which was already introduced as "Basic RNAV" in Europe in the 1990's;
- RNAV 2: in the United States, for en-route continental airspace;
- RNAV 1: for instrument departures;
- RNP 4: for oceanic and remote continental airspace;
- RNP 2: for oceanic, remote and continental applications or for en-route applications;
- RNP 1 (1 nautical mile, 1852 m) which is the most important for continental congested airspace, like in Europe, and which is suitable also at low level in terminal airspace to land and depart from airports;
- Advanced RNP (A-RNP): for all terminal and en-route applications;
- RNP APCH (approach) which allows to use satellite navigation for instrument landing, including for vertical guidance;

- RNP AR (authorisation required) APCH: for instrument approach procedures where limiting obstacles and tight separation requirements exist and/or where significant operational efficiencies can be gained;
- RNP 0.3 (0.3 nautical miles means around 550 m of maximum tolerable navigation error) for helicopter operations.

The mentioned EASA NPA 2013-25 contains a summary table indicating not only the relation between phase of flight and PBN specification, but also the removal of operational approval for all specifications, except for RNP AR APCH and RNP 0.3.
The FAA Advisory Circular (AC) 90-105A, instead does not remove the operational approval. The circular in fact provides RNP guidance for operators to conduct, according to Title 14 of the Code of Federal Regulations (14 CFR) part 97, several types of PBN operations including RNP 0.3 for helicopters. The technical content of this circular reflects ICAO Doc 9613, but still the third edition (2008).
Although FAA still considers the operational approval always necessary, it introduces the concept of "bundling", which provides a method for combining several PBN authorizations within a single Operation Specification (OpSpec), or equivalent document. By allowing PBN authorizations to be bundled, the FAA hence grants a wider range of authorizations based on a single application filed by the operator.
To request authorization for RNP operations, the operator should provide documentation to support evidence of aircraft eligibility, which may be particularly difficult for general aviation operators having retrofitted a GNSS receiver on their old aircraft.
Each flight phase contains a hierarchy of PBN authorizations where bundling can be accomplished. PBN authorizations are combined with less restrictive PBN authorization(s) within each phase of flight, if applicable. This also reduces cost and workload for both the operator and the FAA, even if in a less radical way in comparison to EASA.
The figure illustrates this concept of bundling by flight phase into approach, terminal, en route, and oceanic/remote continental.



The approach phase has two distinct divisions of RNP APCH and RNP AR APCH. Bundling is allowed for the former, but the latter always requires a separate operational approval. In this case, therefore the EASA and FAA position is identical.
Operators qualified for advanced RNP (A-RNP) can fly several PBN types with this single authorisation.
A little bit ahead of the FAA, EASA is harmonised not with the third but with the current fourth edition of the ICAO Doc 9613.
Furthermore EASA, aware that requesting and obtaining a formal approval constitutes an administrative burden, heavy especially for Small and Medium-sized Enterprises (SMEs) and for non-commercial operators, but also for competent authorities, in its mentioned Opinion proposes to simply eliminate the operational approval for the vast majority of existing PBN applications.
In the EASA vision the potentially arising safety risk is mitigated by measures such as, in the first place, a revised syllabus for pilot training for instrument rating (IR). While no proposals for modernising pilot training are yet emerging from the FAA.

In particular, the proposed changes to Implementing Regulation 1178/2011 (Part-FCL) cover:

- "grand-fathering" of existing licences, approvals, ratings and certificates (i.e., they do not immediately lose validity, because some technical rules have been modernised);

- Transition measures necessary for safety reasons, to check in a reasonable time frame all currently instrument rated pilots, to demonstrate Theoretical Knowledge (TK) and practical skill (PS);

- Similar measures for the renewal of instructor and examiner certificates;

- A new Article to mandate Approved Training Organisations (ATOs) to update their respective training programmes not later than 25 August 2016, which is the same date for the end of the derogation period for Part-NCC and Part-NCO;

- Extension of the privileges of instrument rated pilots (i.e. FCL.605) to fly the vast majority of PBN operations, without any additional administrative process for operational approval;

- Theoretical Knowledge (TK), Learning Objectives (LOs) and content of the skill test, proficiency checks and cross-crediting for the instrument rating, now encompassing PBN operations.

The Opinion proposes to maintain the administrative process for operational approval only for RNP 0.3 for helicopter operations and RNP AR APCH, because these PBN specifications are considered not yet mature enough.
For aeroplane operators, removing the specific approval to fly PBN would be a welcomed achievement. But for helicopter operators, with different needs than fixed-wing, the recent EASA Opinion is not yet sufficient. Industry may perhaps stimulate EASA to go further in the near future.

[1]The difference between the RNAV (Area Navigation) and Required Navigation Performance (RNP9 concepts is that both are based on latitude and longitude positioning, but on-board performance monitoring and alerting is required only for RNP but not for RNAV operations.

[2]An ICAO Doc has the status of recommendation and not of a mandatory standard published in one Annex to the Chicago Convention.

[3]Regulation (EU) 965/2012 on air operations; Annex V Part-SPA.

[4]www.easa.europa.eu/system/files/dfu/Opinion%20No%2003-2015_1.pdf

[5]I.e. amending Regulation (EU) 1178/2011, Part-FCL.

SPACE

THE SPACE COOPERATION ENDANGERED BY THE UKRAINIAN CRISIS

Caroline Thro*

It is certainly possible that either government could decide that because of whatever is happening down here on Earth, that cooperation could not continue
(Marcia Smith, NASA speaker)

While Outer Space is not subject to consideration of sovereignty, as reflected by the principle of non-appropriation[1], Outer Space activities might be affected by events happening on Earth.

The Ukraine crisis context

The current crisis in Ukraine started at the beginning of November 2013 while stopping negotiations on the free trade and political association agreement with EU. This failure was caused by the refusal of Ukraine to accept one of the European Union requests: the transfer to Germany of Ioulia Timochenko, the former Ukrainian Prime Minister, jailed since 2011 for abuse of power.

The interruption of the negotiations was also due to the pressing of the Russian Government. Serguei Glaziev, the economic consultant at the Kremlin, facilitated this failure by proposing a cooperation agreement between Ukraine and Russia of billion dollars value[2]. This situation divided Ukraine and as a consequence created a climate of violence.

Following the referendum of the 16th March 2014 and the annexation of Crimea to Russia, threats from western countries arrived shortly after[3]. In fact, media and governments of the European western countries considered this annexation and the referendum as an infringement of international law.

Even though some Western European countries cannot agree on the contents and the efficacy of the political and economic sanctions imposed to Russia, these retaliatory measures contributed to the deterioration of USA-Russia relations concerning the space activities. This situation impacted the space industry of both countries. Without changing the legal existing tools governing space related topics, the United States used them to weaken Russia through sanctions.

*Alumnus of the Master Droit des activités spatiales et des télécommunications (University Paris South) under the supervision of Prof. P. Achilleas.

As of today, the situation in Ukraine has loosened up, but it cannot be said that the peace process has started: the recent elections held in the independent cities of Donetsk and Luhansk have not been recognised by the international community. The situation is still blocked. As a response to the elections, the Western World recently threatened again Russia with new sanctions[4].

Even though the Russian economy is increasingly shrinking, Vladimir Putin, the present Russian President, is not considering making any changes. This economic situation can be best measured with the exchange rate Rouble-US Dollar: since the beginning of the year the Rouble has lost one fifth of its value[5].

Concerning space related industry, the Ukrainian crisis affected all fields. This article will focus on the potential deterioration of the USA-Russia relations with the example of cooperation in Outer Space and more specifically human space flights to the International Space Station (hereinafter: ISS).

The International Space Station – a cooperation in Outer Space

As already foreseen in Resolution 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space", which was adopted unanimously by the United Nations General Assembly on 13th December 1963[6], and afterwards by the Outer Space Treaty, States shall cooperate in Outer Space[7].

One main example of this cooperation is the International Space Station, the biggest space object[8] orbiting around the Earth at approximately 400 km in Outer Space. Its first component part was launched in 1998 and has grown due to the American Space Shuttles, the Russian Soyuz, Proton Rockets, etc.

The ISS serves as a microgravity and space environment research laboratory, whose main aim is to allow the participating States to conduct experiments in different scientific fields. In this respect, the Station is constantly habited by at least three crewmembers who are trained to conduct these experiments.

The ISS is governed by an intergovernmental Agreement ratified by all participating States to this program and by several Memorandum of Understanding (hereinafter: MoU) negotiated by National Aeronautics and Space Administration (NASA for the USA) with other space agencies (European Space Agency – ESA, Canadian Space Agency – CSA, Russian Federal Space Agency – ROSCOSMOS, Japan Aerospace Exploration Agency, JAXA)[9]of each participating State[10].

The International Space Station Intergovernmental Agreement, often referred to as 'the IGA', is a multilateral international treaty signed on 29th January 1998 by the fourteen[11] governments involved in the Space Station project. This key government-level document establishes '*a long term international co-operative framework on the basis of genuine partnership, for the detailed design, development, operation, and utilisation of a permanently inhabited civil Space Station for peaceful purposes, in accordance with international law*'[12].

Where the Intergovernmental Agreement gives a general legal framework for the peaceful cooperation in Outer Space on the ISS, the MoUs on 'agencies-level' shall ensure a clear separation of roles and responsibilities between the agencies.

The MoUs are implemented by several Bilateral agreements signed between the agencies.

A special MoU has been signed between NASA and ESA containing the same objectives valid for the other agencies.

The Ukrainian crisis did not call these agreements into question. States are still bound to respect them, because otherwise they would infringe international law. However, even though the legal framework remains unaltered, the crisis has produced some disruptions.

American threats and sanctions weaken the ISS cooperation

In July 2011 the Americans stopped their 30-year-old shuttle program, and are since then completely dependent on the Russians for human space flights. Americans pay 50 to 71 million dollars for each American astronaut launched by a Soyuz Rocket from Baikonur to the ISS.

Following the annexation of Crimea to Russia, the United States have sanctioned Russia by prohibiting the exportation to Russia of "technology contributing to its military potential"[13]. This prohibition decided by the State Department affects the space industry[14]. Its purpose is to prevent the Russians from participating in launches of European or American satellites. Europeans are also indirectly involved in these sanctions, because all their satellites use American technologies and, thus, won't get exportation licenses.

Export control regulations are tools put in place by the international community to fight against proliferation of mass destruction weapons and their vectors. Following the US regulation, all goods exported or re-exported containing an US technology or piece need a licence released by the US Department of Commerce or by the Department of State, depending on the classification of the product.

A few products used by the space industry might fall under the International Traffic in Arms Regulation (ITAR). Every product falling under the United States Munitions List (USML), thus the ITAR, needs an export licence issued by the Department of State.

All other products are handled by the Department of Commerce. The DOC's Bureau of Industry and Security is responsible for the application of Export Administration Regulations (EAR) that control the export of "dual use" (commercial and military) items and purely commercial items, according to the Export Control Classification Number (ECCN). Exports controlled by this bureau appear in the "Commerce Control List" (CCL)[15].

To sanction a country, the US government can choose to refuse the export or re-export certain goods (Chemical and Biological weapons, nuclear proliferation, national security, Missile technology, Regional stability, Firearms conventions, Crime control, Anti-terrorism) to the concerned country for different reasons by listing it in the Commerce Country Chart (CCC)[16].

Five launches of civil or commercial satellites and one Canadian military satellite from Kazakhstan had to be cancelled. On this point, Russia will not be affected, because the launches were paid for in advance.

Russians responded to these sanctions by suggesting to the Americans to send their astronauts to the ISS by a trampoline. However, this answer cannot be taken seriously because as the Chief of ROSCOSMOS, Vladimir Popovkin said, almost half of the Russian space budget goes to human space flights. In other words, American checks are still much appreciated.

What should be taken seriously into consideration is the Russian response to the Americans threats, saying that Russia will not extend the ISS cooperation after 2020. As of today nothing has been decided yet. The agreement signed between Russia and the USA on the 23rd March 2014 on the ISS cooperation till 2020 remains applicable[17].

However as stated by the NASA speaker, Allard Beutel: *"We do not expect the current Russia-Ukraine situation to have any impact on our civil space cooperation with Russia, including our partnership on the International Space Station program"*[18]. In any case, the United States prefers to be far-sighted[19].

The *US House Armed Services Subcommittee* added 220 million dollars to the Pentagon' 2015 budgetto ensure America's independency from Russia for human space flights. Since 2010, NASA financially supports three private enterprises for the development of a human-rated capsule to the ISS. In May 2014, SpaceX disclosed a human-rated version of the capsule of the Dragon, which could carry a maximum of seven astronauts to the ISS. The first test flight of this public-private partnership[20] is scheduled for 2015. For the moment, it is the only solution for the United States to be self-sufficient at least untill 2017.

One other pressure point of the United-States is the threat to stop monitoring the ISS from the Ground Station Monitoring Centre in Texas if Russia does not bring American astronauts to the ISS. Without monitoring, the ISS would not be able to function anymore[21].

In conclusion, it is clear that the Americans do not intend, with their sanctions against Russia, to terminate the space cooperation with Russia. It is however important to note that Russia looks more and more to China, as its space cooperation partner, who is also suffering from the US sanctions[22]. Both countries signed a Memorandum of Understanding for the cooperation between the Russian navigation system GLONASS and Chinese Beidou after long discussions since last Spring. This MoU foresees the placing of ground stations on the other country's territory to improve the resolution of the satellite systems.

The example of the endangered cooperation for manned flights to the ISS speaks for itself. This issue appears more impressive since it is a negotiation between States in the context of a geopolitical crisis. However, cooperation in Outer Space activities is also shown by a certain number of combined projects at industry level.

Space industry

The power struggle between the superpowers also affects their respective industries since they are deeply interconnected, as the following example show:

- The first stage of the military launcher Atlas V used by the US Air Force is propelled by the motor RD-180 of the Russian Company NPO Energomash.
- The first stage of the Antarès Rocket is built in Russia.
- The launching platform Sea Launch, the company which is launching the Zenit Rocket (mainly composed by Russian parts) is based in California.

Two American companies which are regularly charting goods and products to the ISS depend on a component for the first stage of the Antarès Rocket which are built in Ukraine by Yuzhnoye. The interdependence of these enterprises and programs is due to the high costs of space activities. This cooperation reflects in the end the requirements of international treaties concerning space law[23].

The sanctions against Russia decided by the State Department from 28th April 2014 affect also the already obtained licenses for satellites which have not yet be launched. The Eutelsat 3B Rocket built for Eutelsat by Airbus Defense and Space is now at Long Beach (California) to be launched from Sea Launch. Sea Launch belongs partly to Russia and the Rocket also contains American components, which obliged Eutelsat to obtain export licenses which had to be released, as stated on the 25th April 2014 by the Eutelsat speaker. All these licenses must now be reconsidered.

The American justice sanctioned ULA (United Launch Alliance), a rocket manufacturer created by Boeing and Lockheed Martin. On one launcher, Atlas V, the American company planned to use a Russian motor. This use would violate the American sanctions against Russia. This decision had been taken after Elton Musk's complaint (co-founder and CEO of Space X, competitor of ULA).

In this case it is not clear if the decision taken is based on a competitiveness issue rather than on a real concern of a violation of US sanctions against Russia.

Conclusion – *Status quo*

In the end, it seems clear that the power struggle between the two superpowers will always be won by the US who invest yearly 13 billion dollars for civil programs and four times more for military programs, whereas, ROSCOSMOS only has 2 billion dollars at its disposal for space programs, and is thus financially far away from the Americans.

Finally, as said by John Logsdon, the Russians have a stronger interdependence with the Americans than the other way round[24].

[1]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, *entered into force* Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, Article II.

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RATIFICATION OF THE CAPE TOWN CONVENTION BY THE UNITED KINGDOM

Gustavo Boccardo*

The imminent ratification by the United Kingdom ("UK") of the Convention on International Interests in Mobile Equipment[1] (the "Convention") and the Protocol thereto on Matters Specific to Aircraft Equipment[2] (the "Aircraft Protocol" and together with the Convention, the "Cape Town Convention") serves as an interesting example of how a contracting state faces the legal and policy issues arising from the ratification and implementation of the Cape Town Convention.

Introduction

The Cape Town Convention is a remarkable effort of states to establish a commercially-oriented international legal framework that sets forth the creation, registration, priority, search and enforcement of security and leasing interests[3]. It has been ratified to date by 58 states including major aviation jurisdictions such as the United States and Ireland. There are important economic benefits from becoming a contracting state to the Cape Town Convention, aircraft operators increase their ability to obtain additional – and less costly – sources of financing in the market due to a reduction of legal risks, and not surprisingly, many have pressured their states to become parties of it.

One fundamental aspect of the Cape Town Convention is that it is a tailor-made instrument that allows contracting states to make declarations on several key provisions (*i.e.* non-consensual liens, relationship with the 1933 Rome Convention, internal transactions, territorial units, remedies, pre-existing interests or rights and other certain provisions). The declarations that a contracting state makes can greatly enhance or diminish the Cape Town Convention's ratification economic impact. For example, an aircraft operator (and, if different, the borrower/buyer or lessor) may qualify for a reduction of export credit costs provided that the corresponding contracting state has made the "qualifying declarations" set out by the Organisation for Economic Co-operation and Development's Aircraft Sector Understanding ("ASU")[4].

As part of the UK's ratification and implementation effort of the Cape Town Convention, the government invited stakeholders in the UK to be part of a consultation process and its results were published in March 2015[5] together with an impact assessment[6] and a draft of regulations to implement the Cape Town Convention[7] (the "Regulations"). Parties that submitted responses included manufacturers, lessors, airlines, legal practitioners and non-governmental organizations.

*LL.B. (equivalent to J.D.), Universidad Católica Andrés Bello, Caracas (2007)LL.M. in Air & Space Law, *cum laude*, Leiden University,Leiden (2015)

The government analysed each of the responses and then explained the legal and policy considerations that were taken into account in adopting a particular implementation option. One key consideration was to comply with the ASU export credit discount criteria by making the appropriate declarations in the Cape Town Convention so that eligible operators in the UK would benefit from it.

Although the Cape Town Convention reflects basic concepts of English law partly because of the central role that the UK played in its negotiations and at the diplomatic conference in which the instrument was concluded, its ratification and implementation by the UK involves addressing a number of issues.

Retention of non-consensual liens

Under English law, aircraft may be detained (and sold) to cover for unpaid airport charges and air navigation charges incurred by an operator[8]. These debts take priority over any security that a creditor may have over the aircraft, are not registerable and most worryingly for parties holding an interest over them, the rules allow an aircraft to be detained to cover unpaid charges of an entire fleet[9].

One of the main purposes of the Cape Town Convention is to establish a first-to-file priority-based registration system for interests over an aircraft that is readily available to parties. Therefore, the fact that a set of third parties are able to detain an aircraft without registering their interests and regardless as to whether there are other parties with prior interests registered with the international register, diminishes the very legal certainty that the Cape Town Convention hopes to provide. However, Article 39 of the Convention allows contracting states to make a declaration whereby non-consensual liens have priority over a registered international interest created under the terms of the Cape Town Convention. Therefore, by making the appropriate declaration, a contracting state that already has such provision in its laws, is able to retain it under the Cape Town Convention.

The "fleet lien" has been strongly – and correctly – criticised by legal practitioners and academics and many saw the ratification of the Cape Town Convention as an opportunity to repeal it. Indeed, respondents to the consultation raised their concerns by stating that the "fleet lien" is a draconian compliance mechanism that unjustly affects aircraft lessors and financiers. However, while noting the concerns regarding the potential impact of the fleet lien on third parties, the government decided to retain all existing and future non-consensual rights with priority under UK law over an interest equivalent to an international interest, including the fleet lien and will therefore make the appropriate declaration. This is reflected in the Regulations[10].

Insolvency remedies

The Cape Town Convention contains alternative provisions in respect of insolvency remedies available to creditors. Article XI Alternative "A" enables the contracting state which is the "primary insolvency jurisdiction" to specify a "waiting period" at the end of which the insolvency administrator or the debtor must give up possession of the aircraft or engine to the creditor unless the insolvency administrator or the debtor has resolved all defaults and agreed to perform all future obligations under the relevant agreement[11].

The main advantage of adopting Alternative "A" is that by having a waiting period together with the availability of remedies to de-register and export aircraft from the state where it is situated, creditors may be assured that in an event of default the aircraft can be recovered within a fixed period[12].

Alternatively, Article XI Alternative "B" provides that the insolvency administrator or the debtor are to give notice to the creditor either that they will resolve the defaults and perform all future obligations or give possession of the object to the creditor allowing the court to require additional steps or guarantees and if no notice is made by the insolvency administrator or the debtor, the court may allow the creditor to take possession of the aircraft[13]. This alternative allows for greater involvement of courts in line with civil law tradition. Finally, in the absence of a declaration of the contracting state as to whether which alternative it chooses, the remedies on insolvency are governed by applicable law[14].

Alternative "A" is, not surprisingly, favoured by lessors and financiers and is also part of the ASU discount criteria. The majority of stakeholders in their responses called for the government to adopt Alternative "A" in the implementation of the Cape Town Convention. However, insolvency practitioners stated that English law insolvency rules are robust and well understood by parties and therefore there was no need to implement Alternative "A", national insolvency rules should then be retained.

In the end, the government decided to adopt Alternative "A" based on the fact that (i) there are potential economic benefits for aircraft finance associated with the adoption of such alternative (*i.e.* complies with the ASU discount criteria) and (ii) aircraft are a sufficiently unique type of asset that warrants a separate administration regime. Therefore, Alternative "A" is reflected in the Regulations and a 60-day "waiting period" was adopted as well, all in line with the ASU discount criteria[15].

Lex situs and the international interest

Under English law, the *lex situs* principle is used to determine whether a security interest has been validly constituted over an aircraft[16]. This means in practice that in order for an English law security interest to be validly constituted over an aircraft, the aircraft needs to be physically located in the UK at closing time. This has substantial practical implications when choosing English law as applicable law and increases the parties' transactional costs.

The Cape Town Convention seeks to exclude the application of conflict of interest laws when creating interests over aircraft. Therefore, the fact that the *lex situs* is applied under English law conflicts with this very goal because under the Cape Town Convention, an international interest is constituted over an aircraft once the validity conditions provided therein are satisfied without taking into account national laws[17]. Therefore, the UK had to address this crucial matter in the implementation of the Cape Town Convention.

The government, in line with the provisions of the Cape Town Convention, declared that an international interest is a proprietary right that takes effect in law once the conditions for the creation and registration of an international interest are satisfied effectively distinguishing an interest created under the Cape Town Convention and other interests created outside it.

Consequently, the validity of a security interest under English law which is not an international interest would still be determined by the application of *lex situs*. This interpretation is included in the Regulations[18].

Irrevocable De-Registration and Export Request Authorisation

The Cape Town Convention sets out an irrevocable de-registration and export request authorisation ("IDERA") that allows the person in whose favour the authorisation has been issued to exercise the remedies available to it[19]. Contracting states are able to make a declaration as to whether this provision applies and is also part of the ASU discount qualifying criteria. The government acknowledged that under English laws, a power of attorney can be issued by the debtor and that therefore, making a declaration to apply the IDERA was not altogether necessary. However, the government decided to adopt the IDERA provision because it saves costs for businesses in terms of complying with the local rules set by each contracting state. Under the Regulations, the UK's Civil Aviation Authority (the "CAA") must honour a request for de-registration filed with it but subject to any applicable safety laws and regulations[20]. The CAA will provide further guidance on this matter.

Conclusions

The UK will be ratifying and implementing the Cape Town Convention in a way that it achieves its maximum effect *i.e.* reducing legal risk by having an international framework under which aircraft financiers can arguably predict outcomes and thus allowing operators in the UK to obtain financing on more favourable terms. Moreover, by having made all the ASU "qualifying declarations", operators in the UK will be able to benefit from the export credit discount provided that the "home base" rule is not applicable. Although the government stated that it had evaluated the impact of each of the implementation options separately and on their own merit, it seems that the rationale behind the government's choices was to effectively comply with the ASU criteria, as other contracting states to the Cape Town Convention have done.

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[17]*Article 7 of the Convention.*

[18]*Section 6 of the Regulations.*

[19]*Article XIII and Annex of the Aircraft Protocol.*

[20]*Section 22 of the Regulations.*

COURT OF JUSTICE OF THE EU CLARIFIES THE CONCEPT OF 'PASSENGER' FOR AVIATION INSURANCE MATTERS

Irene Otero Fernandez*

On February 26th 2015 the Court of Justice of the European Union delivered a judgment on the interpretation of Regulation (EC) No 784/2004 on insurance requirements for air carriers and aircraft operators, as well as on the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28th May 1999, signed by the European Community on 9 December 1999, and approved by Council Decision 2001/539/EC of 5th April 2001. This decision closed Case C-6/14, *Wucher Helicopter GmbH. and Euro-Aviation Versicherungs AG v Fridolin Santer*.

The case originated from a request for a preliminary ruling to the Court of Justice of the EU submitted by the Austrian *Oberster Gerichtshof* (Supreme Court) in the proceedings between an Austrian air carrier, its German insurance company and an expert in the blasting of avalanches. The object of the main proceedings was compensation for an injury that the expert, Mr Santer, had suffered in an accident which occurred during a flight in a helicopter owned by the Austrian carrier. Mr Santer was injured when the door of the helicopter flew open while he was holding it, so that explosives could be thrown to blast an avalanche. This was his task according to his employment contract with a third company, which had in turn entered into a contract with the air carrier for the transport of its employees.

Mr Santer's claim for compensation was successful at first instance: the Austrian judge held that the action for damages was well-founded and that he had travelled as a passenger. Thus the carrier and its insurers were found liable under Austrian law. Although the liability was upheld by the appellate court, the latter considered that Mr Santer had not travelled as a passenger within the meaning of the Montreal Convention, since the purpose of the flight had not been to carry him from one place to another, but to allow him to perform his job. The appellants then brought an action for review on a point of law before the Austrian Supreme Court, with the view that Austrian law was not applicable and that Mr. Sander was not a passenger but a member of the crew, so no compensation was due to him.

Therefore, the Austrian Supreme Court decided to ask the European Court whether Article 3(g) of Regulation 785/2004 was to be interpreted as meaning that the occupant of a helicopter held by a Community air carrier, who is carried on a contractual basis for the purpose of a particular job as a guide familiar with the terrain, is a passenger or a member or the flight or cabin crew. It also asked whether the term 'passenger' in Article 17(1) of the Montreal Convention should be interpreted as equivalent to the meaning of 'passenger' in Article 3(g) of the aforesaid Regulation.

*PhD Candidate at the European University Institute

In order to answer the first question, the EU Court first reviewed that "the concept of 'passenger' within the meaning of Article 3(g) of Regulation 785/2004 includes any person who is on a flight with the consent of the air carrier or the aircraft operator, excluding on-duty members of both the flight crew and the cabin crew." As a result, the rule is that persons on board are classified as passengers, while members of the flight or cabin crew are the exception. The Court then noted that, according to its settled case-law, "exceptions are to be interpreted strictly so that general rules are not negated."

As Mr Santer did not perform any tasks typical of the flight crew, the Court concluded that he could not be considered a member of it. Moreover, the Court held that the fact that the expert had the task of opening the helicopter door at the pilot's direction did not suffice to confer on him status of 'member of the cabin crew'. In fact, it was observed in the judgment that the pilot is always authorised to give instructions to anyone on board the aircraft, including passengers. Consequently, the Court deemed that a person such as Mr Santer must be considered a passenger within the meaning of Regulation 785/2004.

Regarding Article 17 of the Montreal Convention, the point of departure of the reasoning of the Court was that the Convention is an integral part of the EU legal order, which moreover became applicable to domestic flights by virtue of Regulation 2027/97. The Court then observed that Article 3(1) and (2) of the Montreal Convention links the status of 'passenger' to the issuance of an individual or collective document of carriage, or another type of document with the same contents. However, Article 3(5) states that the absence of those documents does not affect the existence or the validity of the contract of carriage, which is all the same subject to the rules of the Convention, including those relating to limitation of liability. Article 17(1) provides in its turn that the carrier is liable for damage in case of death or bodily injury of a passenger, as long as the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Since Mr Santer was an employee who was flown on a contractual basis to perform his usual tasks, from the take-off location to the place where the avalanche blasting was to take place and then back to the take-off location, the Court considered the purpose of the flight at issue in the main proceedings to be the carriage of employees to where they had to perform their job. Therefore, the Court concluded that Article 17 of the Montreal Convention must be interpreted as meaning that a person who comes within the definition of 'passenger' within the meaning of Article 3(g) of Regulation 785/2004, also comes within the definition of 'passenger' within the meaning of Article 17, once that person has been carried on the basis of a 'contract of carriage' within the meaning of Article 3 of that convention.

AN UPDATE ON THE TAKEOVER OF AER LINGUS BY IAG

Alessandra Laconi*

As known, International Airlines Group (IAG), which owns British Airways and Iberia, first approached Aer Lingus with a takeover offer at the end of 2014, making an indicative offer in January 2015.

On the 26th May 2015, the Irish government gave its backing to the sale of Aer Lingus after the offer for the State's 25% stake in the flag carrier from IAG.

The cabinet rendered its decision after months of negotiations, accompanied by political and public trouble concerning the bid's implications for jobs and flights to and from Ireland.

At the preliminary stage of the negotiation, IAG proposed to guarantee Aer Lingus' 23 lucrative take-off and landing slots at Heathrow for five years. This has been one of the biggest hurdles in getting government approval, together with the guarantee of Belfast routes for five years.

The institutional backing was obtained after IAG's offer of a seven-year guarantee on strategic routes into London Heathrow from Dublin, Cork and Shannon on condition that airport charges would not increase beyond a certain limit. Therefore, the government accepted the notable changes to IAG's initial offer, which does not foresee redundancy and sets to create an additional 635 jobs by 2020.

Under the deal, IAG offers Aer Lingus shareholders €2.55 a share - €2.50 plus a €0.05 dividend – valuing the airline at € 1.36 billion.

According to the Irish Ministry of Transport, IAG's offer is *"in the best interests of the travelling public, Aer Lingus and its employees, the Irish tourism industry and the Irish economy"*.

The Irish Parliament then debated the cabinet's decision, and gave the examined bid the final go-ahead on the 28th May 2015, after two days of tense negotiations.

The formal offer was sent to the Aer Lingus shareholders on the 19th June 2015, however the bid remains conditional to Ryanair's acceptance, as a 29% shareholder in Aer Lingus, and not least on EU approval.

Ryanair spokesman Robin Kiely affirmed that the board will consider any offer, and chief executive Michael O'Leary recently said his company would consider any offer from IAG for its shares but it is believed that he wants further concessions from IAG, including a number of its slots at Heathrow airport.

*Teaching Assistant of Air Law at University of Bologna

MISCELLANEOUS MATERIAL OF INTEREST

It must be noted that the Competition and Markets Authority (CMA) said Ryanair must cut its stake in Aer Lingus from 29.8% to 5%, and Ryanair has applied to the Supreme Court to appeal the decision. If the Supreme Court agrees to hear the case, it could reasonably lead to a lengthy delay in the takeover of Aer Lingus by IAG.

On the other hand, IAG recently met the European Commission in a "state of play" meeting in order to fully evaluate the possible effects on competition of the analysed merger, thus one might suppose that the EU competition approval for the described plan seems unlikely to be reached without concessions.

On the commercial side, the main attraction for IAG is the prospect that Aer Lingus can expand its transatlantic services from Dublin airport, which, unlike Heathrow, has spare runway capacity. In setting out its plans for Aer Lingus, the acquiring group has estimated that by 2020 a combined group could deliver up to 2.4 million more passengers, add four new destinations in North America and eight new aircraft to its fleet.

The offer also promises to keep the airline's brand and head office in Ireland and boost connectivity.

IAG's offer will remain open for acceptance until 5 pm on 16th July 2015.

THE NEW ITALIAN REGULATION ON UAV

Irene Otero Fernandez*

The Italian Civil Aviation Authority (ENAC) is the competent body in Italy for the regulation of unmanned aerial vehicles (UAV) and systems (UAS) – also known as Remotely Piloted Aircraft Systems (RPAS) - under 150 kg of weight. Indeed, within the realm of EU law, Annex II of Regulation (EC) No 216/2008 exempts this category of aircraft, *inter alia*, from the application of the European rules and, therefore, from the authority of EASA. As a result, national authorities have the power to decide on the requirements and procedures for the operation of light UAS (i.e. UAS under 150 kg, as mentioned above) in the respective national airspace.

ENAC has been one of the first national authorities to produce a regulation on light RPAS operations, in response to the demands of the industry and operators, which needed a clear legal framework to guarantee the safe and regular development of this new technology. Thus, ENAC Regulation on Remotely Piloted Aerial Vehicles was published in December 2013[1]. According to its Article 2, it applies to RPAS operations under the competence of ENAC (i.e. RPAS of maximum take off mass not exceeding 150 kg; as well as those designed or modified for research, experimental or scientific purposes, which are nonetheless very rare) and to model aircraft. The exceptions to the applicability of the ENAC Regulation include State RPAS, RPAS that have such design features that the pilot cannot intervene in the control of the flight, indoor RPAS operations, and balloons used for scientific observation or tethered balloons.

The Italian Regulation on UAV has been in force since April 30th 2014[2]. Recently, on March 19th 2015, a much awaited draft second edition of the Regulation was presented[3]. On the same date, an order urgently amending Article 8 of the first edition of the Regulation was also published[4].

The product of the lessons learned from the practical application of the Regulation in the previous year, and of the demands put forward by the industry and operators, the draft second edition was published on the website of ENAC and submitted to a consultation process, which was closed on 20th of April 2014. The updated Regulation introduces several changes, whose main points are summarized in the following paragraphs.

First of all, in Section I – the 'General' part – an Article 8 has been added. This new provision, under the title 'Circulation Rules', provides general instructions for the execution of the different modalities of RPAS operations (VLOS, EBLOS, BLOS). The requirements for the VLOS (Visual Line of Sight) operations differ from the first edition. The required minimum distance from aerodromes for VLOS operations decreases from 8 to 3 km, both in critical and non-critical operations. Moreover, all VLOS opera-

*PhD Candidate at the European University Institute

operations are free provided that a maximum limit of 400 ft of height is respected, that the distance to the pilot is less than 500 m horizontally, and that the pilot is visible and noticeable.

Sections II and III of the draft second edition reproduce the division set out in the first edition: RPAS under 25 kg of weight and RPAS of 25kg or more. However, RPAS under 25 kg (Section II) receive greater attention and are regulated in further details in the last version of the Regulation. While the first edition only devoted one article to this category (Article 8), the second edition includes five provisions on it (Articles 9-13).

Safety requirements for operations with RPAS under 25 kg are indeed more thoroughly defined in the second edition: e.g. Article 9(5) provides that ENAC may require lights or other devices to be installed in the aircraft in order to improve visibility. As for the authorization required for critical operations, and the declaration for non-critical operations, they remain substantially the same. However, an Article is now devoted to each type of operations (critical and non-critical). According to Article 12 (5), critical operations with RPAS under 25 kg over urban areas are now allowed under several conditions: the RPAS needs to have an acceptable level of safety, i.e. a command and control system whose software complies with the EUROCAE ED-12 standards (reliability level D, at least); the aircraft must also be equipped with a system that ensures that control is maintained if the data link is lost, or at least that the effects of the loss are minimized, and with an independently-controlled flight termination system. Flying over groups of people remains prohibited in any case.

It is noteworthy that special provisions on RPAS lighter than 2 kg have been adopted in the new Article 13, as was already foreseen in Article 8(18) of the first edition. This new Article states that operations with RPAS whose maximum take-off mass is less than or equal to 2 kg are always considered non-critical, provided that the RPAS' design characteristics are of an inoffensive nature. However, the concept of 'inoffensive' remains to be clarified.

Another important amendment has been made with respect to permits for pilots in Section IV – 'General Provisions': in order to pilot RPAS under 25 kg in VLOS conditions a 'Remote Pilot Certificate ('*Attestato di Pilota remoto*' - Article 21) will be required, while a 'Remote Pilot License' ('*Licenza di Pilota remoto*' - Article 22) will be compulsory for operating heavier RPAS. New aeronautical titles are thus introduced into the Italian system, specifically for RPAS pilots. The new Certificate will be issued by a series of authorized centres after passing an exam, while the exam for the License may only be taken with ENAC. A training period is envisaged for both cases.

As mentioned above, Article 8 of the first edition of the Regulation has been urgently amended. As a result, experimental activity for the purpose of research and development, or prior to the presentation of the application for the authorization or the declaration to ENAC, does not need to be notified to the aviation authority any more, nor does its authorization need to be sought. This change is due to the lack of safety problems with respect to that experimental activity, which was nonetheless overloading ENAC with notifications and applications. This amendment has been in force since the last 25th of March, when it was ratified by the governing body of ENAC.

It can be doubtlessly affirmed that the Italian provisions on UAV operations are undergoing a reform process. However, only some small concrete changes have taken

place so far. The true reform – i.e. the entry into force of the second edition of ENAC Regulation – has not yet occurred. The consultation process is now over; but, with the draft second edition now withdrawn from the ENAC webpage, the final outcome is eagerly awaited.

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[1] *ENAC Regulation 'Remotely Piloted Aerial Vehicles', Edition No. 1 dated 16.12.2013, courtesy English translation available at: https://www.enac.gov.it/repository/ContentManagement/information/N1220929004/Reg%20SAPR%20english_022014.pdf*

[2] *Disposizione 4 /DG del 14 febbraio 2014- Modifica dell'articolo 26 del Regolamento ENAC 'Mezzi Aerei a Pilotaggio Remoto' (Order 4 D/G of February 14th 2014 - Amendment of Article 26 of the ENAC Regulation 'Remotely Piloted Aerial Vehicles'), accessible in Italian at: https://www.enac.gov.it/repository/ContentManagement/information/P1022713825/Rinvio%20entrata%20in%20vigore%20Reg.%20Mezzi%20Aerei%20a%20Pilotaggio%20remoto.pdf*

[3] *Bozza di Regolamento ENAC 'Mezzi aerei a pilotaggio remoto'* (ENAC Draft Regulation *'Remotely Piloted Aerial Vehicles'), 2nd Edition, published on March 19th 2015, accessible in Italian at: http://www.aeroclubcagliari.it/sites/default/files/Consultazione_Reg_APR_Mar15.pdf*

[4] *Disposizione 8/DG del 16 marzo 2015 - Modifiche al Regolamento ENAC 'Mezzi Aerei a Pilotaggio Remoto' (Order 8/DG of March 16th 2015 - Amendments to ENAC Regulation 'Remotely Piloted Aerial Vehicles'), accessible in Italian at: https://www.enac.gov.it/repository/ContentManagement/information/P593565219/Disp_8-DG_2015.pdf*

PROBLEMS IN IMPLEMENTING DIRECTIVE 2009/12/EC IN THE ITALIAN LEGAL SYSTEM

Donatella Bocchese*

The Member States of the E.U. should have implemented the provisions of Directive 2009/12/EC on airport charges by 15 March 2011. Although they were late in doing so, Italian lawmakers have moved in the right direction, adopting Law Decree no. 1 of 2012, more commonly known as the "Liberalization decree", which was converted into Law no. 27,2012.

This measure, like the Directive, does not apply to charges collected for the remuneration of en route and terminal air navigation services, as indicated in Regulation (EC) No. 1794/2006 (which has now been replaced by Regulation No. 391/2013) or to charges levied for the funding of assistance to disabled passengers and persons with reduced mobility, referred to in Regulation (EC) No. 1107/2006 (article 71.5 of Law Decree no. 1 of 2012).

Its scope of application does not extend to charges collected for the remuneration of ground-handling services, referred to in the Annex to Legislative Decree no. 18 of 1999 (article 71.5 of Law Decree no. 1 of 2012) either, as is the case with the European provisions, which clearly state that Directive 2009/12/EC does not apply "to the charges collected for the remuneration of ground-handling services referred to in the Annex to Directive 96/67/EC"(article 1.4 of Directive 2009/12/EC).

Nevertheless, article 72.1(d), of the Italian measure differs from article 4.2 of Directive 2009/12/EC, as it provides a broader definition of «airport charge». Indeed, in the European text, an «airport charge» is «a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight». The above Italian regulations, in addition to what is stated in article 4.2 of the Directive, also include fees for the use of both centralized infrastructures and goods of common and exclusive use in this notion.

The entry into force of Law Decree no. 1 of 2012 seems to have created an overlap in the regulation of centralized infrastructures. Before clarifying the impact of this phenomenon on the Italian legal landscape, one may ask what «centralized infrastructures» are. They are mentioned, for example, in the Annex B to Legislative Decree no. 18 of 1999, which implements Directive 96/67/EC on access to the ground-handling market at Community airports in the Italian legal system.

In this category, Annex B of the aforementioned decree includes:1. management of the baggage handling system; 2. technical management of the piers for boarding and disembarking passengers; 3. management of the centralized system for powering, cooling and heating aircraft; 4. management of centralized systems for de-icing air-

* Researcher of Air and Maritime Law, University of Roma "La Sapienza".

craft; 4. management of centralized IT systems; 5. management of static centralized systems for distributing fuel; 6.management of centralized systems for storing and washing catering materials.

It should also be highlighted that according to article 9.1 of Legislative Decree no. 18 of 1999, when the complexity, cost or environmental impact of centralized infrastructures makes it impossible for these to be split up or duplicated, the national body for civil aviation (*i.e.* ENAC), after consulting with the Users' Committee and the Managing body of the airport, may assign the exclusive management of these to the latter only – unlike Directive 96/67/EC, which states that "[…]reserve for the managing body of the airport or for *another body*" (article 8.1) - and make their use mandatory for suppliers of ground-handling services and self-handling airport users.

Since the «centralized infrastructures» may represent structural limits to free access to the ground-handling services market, the above provision gives the Ministry of Infrastructure and Transport the task of monitoring - through ENAC - that access of ground-handling service providers and self-handling airport users to centralized infrastructures is given according to transparent, objective and non-discriminatory *criteria* (article 9.2 of Legislative Decree no. 18 of 1999).

Regarding the calculation of fees for the use of this type of infrastructure, article 8.2 of the same measure states that the airport managing body must establish a consultation procedure with the Airport Users' Committee at least once a year, while article 10(d) stipulates that these fees must be relevant to the operating and development costs of the airport concerned.

Although the centralization of infrastructure concerns only systems and not services, it should be stressed that according to Italian administrative case law, it is worth making a distinction between services which are instrumental to the management of centralized infrastructures (e.g. centralized systems for managing and distributing fuel) and mere ground-handling services, which, as opposed to the former, are additional services for airport users (e.g. fuel and oil handling) (Council of State ruling no. 4260 of 5 October 2010).

It is now possible to analyze the overlap phenomenon, referred to above. First of all, it should be emphasized that Law 2012 no. 27 established the Transport Regulation Authority in Italy, which performs tasks of economic regulation and supervision, by approving tariff systems and airport charge amounts (pursuant to article 71.2 of Law Decree no. 1 of 2012).

More precisely and in brief, this institution provides specific tariff models, calibrated on the basis of the annual traffic of passengers recorded at the airport, so that each managing body, after identifying the most suitable model, determines the level of airport charges, after activating a consultation procedure with airport users, and finally submits the model to the Authority for approval (article 76 of Law Decree no. 1 of 2012).

It useful to point out that both Legislative Decree no. 18 of 1999 and the most recent Law Decree no.1 of 2012 identify «airport users» only as «any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned» [article 2.1(d)of Legislative Decree no. 18 of 1999, article 72.1(c) of Law Decree no. 1 of 2012].

Nonetheless, the scope of application of the two texts is not the same, insofar as Legislative Decree no. 18 of 1999 applies not only to carriers, but to suppliers of ground-handling services too, defined as «any natural or legal person who provides third parties with one or more categories of ground-handling services» [article 2(g) of Legislative Decree no. 18 of 1999].

Consequently, since the entry into force of Law Decree no. 1 of 2012, the use of centralized infrastructures has been regulated in different ways, falling under the aegis of the latter measure, where self-handling carriers are concerned, and Legislative Decree no. 18 of 1999, where suppliers of ground-handling services are concerned. It is clear that the overlapping of regulations and especially of powers between the competent bodies does not help to simplify the regulatory framework of reference for airport charges, which has always been rather confused in the Italian legal system, or to promote or ensure competition in the sector.

In this regard, it should be noted that the proposal for a regulation on ground-handling services in European Union airports with a view to repealing Council Directive 97/67/EC [COM (2011)824 def.] in establishing rules for access to centralized infrastructures and installations and the related fees (articles 27 and 28 of the proposal) also referred to both airport users (*i.e.* self-handling carriers) [article 2(c)] and «suppliers of ground-handling services» [article 2(f)].

A final observation must be made on the three tariff models approved by the Transport Regulation Authority and attached to Resolution no. 64/2014, applicable to airports with traffic of more than five million passengers (Model 1), or to those with traffic of more than (Model 2) or less than three million passengers (Model 3), respectively.

In principle, all the models define centralized infrastructures with a simple reference to Annex B to Legislative Decree no. 18 of 1999 (article 2.14), even if the definition of the fees for their use shows the functional and instrumental value of such infrastructures to air transport [article 2.12(e)]. The models moreover only identify «airport users» as carriers (article 2.26) and define «airport charges» (article 2.12) in the same way as Law Decree no. 1 of 2012, including them in the field of aviation products subject to tariff regulation [article 7.1(d)].

FORTHCOMING EVENTS

WALA 2015 Annual Conference

Athens, September 9th - 11th, 2015

The Aviation & Space Journal is pleased to endorse a forthcoming event, organized by The Worldwide Airport Lawyers Association (WALA) in Athens from September 9th – 11th, 2015.

Hosted by Athens International Airport (AIA), it is the Association's 8th annual conference and annual general meeting (AGM) and will take place at the Hilton Athens Hotel with SITA, the world's leading specialist in air transport communications and information technology, as the main sponsor.

For the first time WALA will recognize a recent written contribution in the field of airport law through the newly created WALA Annual Award.

For information and registration details can be found at www.wala2015.org

About WALA

WALA (Worldwide Airport Lawyers Associations) is registered in Vancouver, Canada, and was conceived in Prague, Czech Republic, on September 2007, where destiny gathered lawyers from airport operators in different countries worldwide. At that moment the attending delegates agreed about the fact that air/aeronautical law in each of their countries was outdated to face the new reality of airport service and operation, which required specialized legal knowledge. Consequently, they agreed about the need to create and promote worldwide a forum, a meeting place in which airport lawyers and all others that might be interested can develop, share and debate relevant issues in their field of law.

Seven months later WALA became a reality with the first edition of the conference taking place in Spain. Since then subsequent editions of the annual meeting took place in Madrid, Lisbon, Dallas, Amsterdam, Montreal and Buenos Aires.

For more information about WALA please visit www.wala.aero

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EUROPEAN AIR LAW ASSOCIATION

10TH MUNICH LIABILITY SEMINAR

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EALA is pleased to invite you to attend its 10th Munich Liability Seminar which will be held in Hilton Hotel Munich Airport.

The 10th Munich Liability Seminar will again cover a wide range of topical issues:

- New air traffic management technology will improve safety, but may change liability risks for manufacturers and opera-tors. Will this re-quire new liability insurance solutions?
- Regulation 261/2004 - current issues and how air carriers can respond
- Liability issues resulting from overflight of conflict zones
- Update on toxic fumes in aircraft and air traffic disruptions resulting from vol-canic ashes
- Update on liability of airports for birdstrikes
- Perhaps now more than ever, airframe manufacturers have available to them a range of strong defenses in aviation accident litigation filed in the United Sta-tes, including reinvigor-ated defenses based on personal jurisdiction and forum non conveniens.
- The Germanwings crash has stirred a debate about whether moral damages/ pain and suffering awards for victims of aviation accidents and their families should be increased. It has been proposed that an international instrument should govern these damages.

We invite all aviation lawyers, airline, insurance and re-insurance industry, aircraft and aircraft engine finance, aerospace industry and airport representatives as well as government officials and academics to join us for this com-prehensive programme.

The one-day format and the timing of the very successful previ-ous liability seminars have been retained in order to allow the delegates to travel to and from Munich the same day from most places in Europe.

The venue is as always the award winning Hilton Hotel Munich Airport (formerly: Kempinski), a few steps away from the gates of Munich Airport, a young and dynamic airport with continu-ously high rankings in international airport surveys.

Venue: Hilton Hotel Munich Airport— Terminalstrasse/Mitte 20

Date: September 14th 2015

Time: 10:00-18:30

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"L'impresa aeroportuale a dieci anni dalla riforma del codice della navigazione: stato dell'arte"

The Aerospace Law Chair of the Department of Law of the University of Bergamo-Italy is pleased to organize, in the SACBO S.p.A. (the Airport Authority of Orio al Serio Airport) headquarter at Bergamo Airport, a conference on "Airport companies ten years from the reform of the Italian Navigation Code: the current situation". The conference aims to discuss whether, 10 years following the reform of the Italian Navigation Code it is an opportune time for the National Legislator to take action on aviation aspects, which refers to airports, also in the light of the National Airport Plan and the regulatory interventions by the European Union on safety and noise reduction in the airport environment.

Venue: SACBO S.p.A. headquarter at Orio al Serio Airport, Via Aeroporto, Bergamo

Date: November 13th 2015

Time: 09.00 – 18.00

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